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No. 651

In The

Supreme Court of the United States

term, 19

PAUL E. RHODES, PETITIONER,

V.

MAURICE SIGLER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of Nebraska.

PAUL E. RHODES, Pro Se,
Convict No. 22107,
Nebraska State Penitentiary,
Lincoln, Nebraska.

PAUL RHODES, Pro Se,
Counsel of Record.

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PETITION FOR WRIT OF CERTIORARI
To The Supreme Court of Nebraska.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Paul E. Rhodes for a writ of certiorari to be directed to the Supreme Court of the State of Nebraska, to review a judgment of that court entered on the 23rd day of June, 1961, rehearing denied on the 13th day of October 1961.

OPINION BELOW

The opinion appealed from is entitled Paul E. Rhodes, Appellant v. Maurice Sigler, Appellee, and is reported

in 172 Neb. 439, and is printed in Appendix A hereto, infra, page 23.

JURISDICTION

The opinion and judgment sought to be reviewed was dated June 23, 1961, and was entered of record on that date. Rehearing was denied on October 13, 1961 (Appendix A, page 38). Contained in transcript at page 132.

The jurisdiction of this Court is invoked under the Act of Congress of June 25, 1948, c. 646, 62 Stat. 929, 28 U. S. Code, Sec. 1257 (2) and (3), providing that this Court may, by writ of certiorari, review any final judgment for decree rendered by the highest Court of a State in which a decision could be had, where any title, right, privilege or immunity especially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under the United States.

THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a trial in absence of defendant in a contempt proceeding and no order being issued for the arrest of defendant, he not being in custody and not within the jurisdiction of the court, the court enters an order finding defendant guilty in his absence and sentences him to the penitentiary at hard labor for contempt of court, and the court does not order him into custody, is the Clerk of the Court authorized to issue a commitment to the penitentiary without order of the court thereof, and the Supreme Court of the state thereafter suspends the execution of said sentence, and thereafter without a warrant or order of the court the pe-

titioner is taken into custody by force, and thereafter the commitment is executed by the sheriff and the Warden of the penitentiary without any order for execution of the sentence; is petitioner as relator in a District Court Habeas Corpus proceeding entitled to a Writ of Habeas Corpus and discharge from custody.

2. Whether a trial in absentia, in absence of defendant, for contempt of court is a nullity, absolutely void, and petitioner imprisoned thereunder is entitled to discharge upon Habeas Corpus.

3. Whether there is power or authority to arrest on a commitment; whether it is a warrant for purposes of arrest.

4. Whether after suspension of sentence by the Supreme Court of Nebraska on error proceedings the sheriff has authority to execute a commitment issued prior to said suspension without further order of the court directing its execution.

5. Whether where sentence is executed after suspension by the Supreme Court of Nebraska and confinement had in the penitentiary contrary to the suspension, Habeas Corpus is the proper remedy for discharge and release.

6. Whether a sentence for contempt of court at hard labor in the penitentiary is absolutely void in Nebraska and in violation of Article I, Sec. 2, of Nebraska Constitution and the Thirteenth Amendment of the Constitution of the United States and the Fourteenth Amendment, Section 1, of the Constitution of the United States, the due process clause, and the petitioner imprisoned thereunder at hard labor is entitled to a Writ of Habeas Corpus and Discharge from Custody.

7. Whether the clerk of the court is authorized to issue commitment to the penitentiary where defendant is not in custody and there is no order of court directing that he be taken into custody.

8. Whether when detention is had under a void sentence Habeas Corpus is the proper remedy to secure discharge and release from custody.

9. Whether when imprisonment is being suffered under void judgment for contempt Habeas Corpus proceeding is the proper proceeding for inquiry into the question of jurisdiction.

10. Whether when proceedings are wholly void for want of jurisdiction over the subject matter, or wholly illegal, habeas corpus proceedings are the proper procedure for release from said unlawful imprisonment and involuntary servitude.

11. Whether the court in prosecution for criminal contempt has jurisdiction to try defendant in his absence, make a finding of guilty and pass sentence.

12. Whether the rules which govern criminal prosecutions apply to prosecution for criminal contempt.

13. Whether the court has jurisdiction to sentence to the penitentiary at hard labor in Nebraska for contempt of court, no trial by jury being allowed in contempt proceedings.

14. Whether the court has jurisdiction of the subject matter in a contempt proceeding at time of trial when alleged defendant is not present in court.

15. Whether the court in Nebraska is without jurisdiction to order confinement at hard labor in the penitentiary in Nebraska for contempt of court when, pur-

suant to Article I, section 2 of Nebraska Constitution and the Sixth Amendment to the Constitution of United States of America, no imprisonment may be made to penitentiary without trial by jury, or conviction of a crime. Trial by jury is not allowed in criminal contempt proceedings in Nebraska, and therefore any confinement in the penitentiary for contempt of court is a denial of due process of law pursuant to Fourteenth Amendment of the Constitution of United States of America, Section 1.

16. Whether the writ of habeas corpus is proper procedure to review a judgment where petitioner is imprisoned without due process of law.

17. Whether the Supreme Court of Nebraska was prohibited by the Constitution of the United States from legislating and repealing 29-2801, R. R. S. Nebraska 1943, re-issue of 1956, and deprive the county courts and district courts of jurisdiction in habeas corpus matters as provided by said statutes or whether the function of government is reserved to the Legislature.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution, Amendment XIV, Section 1:

> "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U. S. Constitution, Amendment XIII, Section 1:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

U. S. Constitution, Amendment IV:

"The right of the people to be secure in their persons, * * * against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons or things to be seized."

U. S. Constitution, Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * * to be confronted with the witnesses against him * * *."

U. S. Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U. S. Constitution, Article I, Section 9:

"* * * The privilege of the Writ of Habeas Corpus shall not be suspended * * *."

Nebraska Constitution, Article One, Section 11; R. R. S. Neb., Vol. 2, p. 56:

"* * * In all criminal prosecutions the accused shall have the right to appear and defend in person or by counsel * * * to meet the witnesses against him face to face * * * and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Nebraska Constitution, Article One, Section 2; R. R. S. Neb., Vol. 2, p. 42:

"Slavery Prohibited. There shall be neither slavery nor involuntary servitude in this state, otherwise than

for punishment of crime, whereof the party shall have been duly convicted."

Nebraska Constitution, Article 3; R. R. S. Neb., Vol. 2, p. 56:

"Due Process of Law. No person shall be deprived of life, liberty, or property without due process of law."

Nebraska Constitution, Article I, Section 7; R. R. S. Neb., Vol. 2, p. 54:

"Search and Seizure. The right of the people to be secure in their persons * * * against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, * * * and particularly describing the * * * person or thing to be seized."

Nebraska Constitution, Article I, Section 8; R. R. S. Neb., Vol. 2, p. 54:

"Habeas Corpus. The privilege of the writ of habeas corpus shall not be suspended * * *."

Nebraska Constitution, Article I, Section 9; R. R. S. Neb., Vol. 2, p. 54:

"Bail; fines; imprisonment. * * * shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

Nebraska Constitution, Article II, Section 1; R. R. S. Neb., Vol. 2, p. 76:

"'Legislative, executive, judicial. The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others * * *."

R. R. S. Neb. 1943, 29-2801:

"If any person * * *, shall be unlawfully deprived of his or her liberty and shall make application, either by himself or by any person on his or her behalf, to any one of the judges of the District Court, * * *, and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a writ of habeas corpus, which writ shall be issued forthwith by the clerk of the district court, * * * under the seal of the court, whereof the person allowing such writ is judge, directed to the proper officer, person or persons who detains such prisoner."

R. R. S. Neb. 1943, 29-2001:

"Trial; felony; misdemeanor; presence of accused required; exceptions. No person indicted for a felony shall be tried unless personally present during the trial. Persons indicted for a misdemeanor may, at their own request, by leave of the court be put on trial in their absence. The request shall be in writing and entered on the journal of the court."

R. R. S. Neb. 1943, 29-2201:

"Verdict of 'guilty'; accused to be notified before sentence. Before the sentence is pronounced, the defendant must be informed by the court of the verdict of the jury, and asked whether he has anything to say why judgment should not be passed against him."

R. R. S. Neb. 1943, 29-2202:

"Verdict of 'guilty'; judgment; when pronounced; suspension of sentence; when. If the defendant has nothing to say, or if he shows no good and sufficient cause why judgment should not be pronounced, the

court shall proceed to pronounce judgment as provided by law. The court, in its discretion, may for any cause deemed by it good and sufficient, suspend execution of sentence for a period not to exceed ninety days from the date judgment is pronounced. If the defendant is not at liberty under bail, he may be admitted to bail during the period of suspension of sentence as provided in Section 29-901.

R. R. S. Neb. 1943, 29-2303:

"Writ of error; felony cases; procedure; escape of convict; warrant issued. Whenever a person shall be convicted of a felony, and the judgment shall be suspended as aforesaid, it shall be the duty of the court to order the person so convicted into the custody of the sheriff, to be imprisoned until the case in error be disposed of, or such person admitted to bail. If a person so convicted shall escape, the jailer or other officer from whose custody the escape was made may return to the clerk of the proper court the writ by virtue of which the convict was held in custody, with information of the escape endorsed thereon, whereupon the clerk shall issue a warrant stating such conviction, and commanding the sheriff of the county to pursue such person into any county in the state; and the sheriff shall take such person and commit him to the jail of the county."

R. R. S. Neb. 1943, 29-2309:

"Writ of error; felony cases; how returnable. In all cases of conviction for a felony, the court, judge or judges allowing the writ of error shall order the same to be made returnable before the Supreme Court, and shall order a suspension of the execution of sentence."

R. R. S. Neb. 1943, 29-2401:

"Execution of sentences; conviction of felony; delivery of prisoner to penitentiary. Every person sen-

tenced to the penitentiary shall, within thirty days, and as early as practicable after his sentence, unless the execution thereof be suspended, be conveyed to the penitentiary of this state by the sheriff of the county in which the conviction took place, and shall there be delivered into the custody of the warden of the penitentiary, together with a copy of the sentence of the court ordering such imprisonment, there to be safely kept until the term of his confinement shall have expired, or he shall be pardoned. If the execution of the sentence be suspended and the judgment is afterward affirmed, the defendant shall be conveyed to the penitentiary within thirty days after the court shall direct the sentence to be executed."

STATEMENT

This action was started as a habeas corpus action in the District Court of Lancaster County, Nebraska. The petition of the petitioner for writ of habeas corpus alleged that petitioner was unlawfully imprisoned in the Nebraska State Penitentiary at *HARD LABOR* under a judgment and sentence of the District Court of Morrill County, Nebraska, entered in a proceeding for contempt of court and contained a copy of the judgment of the court containing this language to-wit: "'The defendant was not present and was not represented by counsel. . . . This matter came on further to be heard upon the merits.' * * * The allegations were that the District Court had no jurisdiction, power or authority, (a) to try the case in absence of the defendant, (b) to enter judgment and pass sentence in absence of defendant, (c) to pronounce sentence of imprisonment in the Nebraska State Penitentiary for nine months, at *Hard Labor*, and fine of $2,500.00 and costs for the offense of contempt of court, or (d) to sentence to Hard Labor for such offense." The petition is contained at

page 9 of the transcript. The petition further alleges at page 11 that said sentence is repugnant to the XIII Amendment to the Constitution of the United States of America, and is repugnant to the Due Process and Equal Protection Clause of the XIV Amendment to the United States Constitution. Petitioner further alleged that the District Court of Morrill County had no jurisdiction because it had been divested of jurisdiction by previous habeas corpus action which released defendant, and discharged him from such custody and charge of contempt, and that the district judge trying the case was disqualified to sit on the matter.

Attached to the petition, and made a part thereof, are copies of the information for contempt, the plea in abatement made thereto, other filings, and the proceedings of the District Court of Morrill County, Nebraska, together with a copy of the writ of error of the Supreme Court of Nebraska, in Case No. 34978, which writ of error indicated that the Supreme Court had suspended the execution of the judgment, and also indicated that the plaintiff in error should be admitted to bail, pending the outcome of that proceeding. The petition and attached exhibits, made a part thereof, clearly indicated that petitioner was not in custody or jurisdiction of the court on November 21, 1960, and no order was ever entered by the court authorizing the issuance of a warrant to deprive defendant of his liberty, and that no warrant was ever issued authorizing the sheriff to deprive the defendant of his liberty as required by the IV Amendment to the Constitution of the United States of America, and further attached to the petition and shown in the transcript of the record at page 83 is the Commitment to the Penitentiary issued by the Clerk of the District Court without order

of the court authorizing the issuance of the same; at page 84 of the record is the return of the sheriff thereon showing the execution of said commitment on January 23, 1961, and the sheriff's signature thereon and the filing of the same by the Clerk of the District Court after return thereon on January 24th, 1961, and at page 82 of the record is shown the Warden's Certificate showing execution of said sentence on January 23, 1961, confining the defendant as convict in the Nebraska State Penitentiary to serve said void sentence; and the petition further alleges the unlawful restraint and imprisonment is under and by virtue of the pretended judgment and sentence of the District Court of Morrill County, of November 21, 1960, that the lack of authority to suspend or ignore the Writ of Habeas Corpus was raised by the Original Petition in the District Court of Lancaster County, Nebraska, contrary to Article I, Section 8 of the Constitution of Nebraska, and Article I, Section 9 of the United States Constitution, as shown at page 12 of the transcript.

Those questions were all presented in the Supreme Court of Nebraska in Appellant's Brief on Appeal (pp. 1-4, and pp. 48-50, at page 103 of the transcript, and printed here in Appendix A hereto, infra, pages 28, 29, 30).

The Nebraska Supreme Court did not, however, consider or determine those issues. Instead the Court sets forth the chronological order of events of the suspension of execution of judgment for contempt on December 23, 1960, the issuance by the Clerk of the District Court on November 25, 1960, of the order to the sheriff to execute the sentence and judgment for contempt and the delivery of Paul E. Rhodes to the penitentiary by the sheriff on January 23, 1961.

Subsequently in the opinion, however, the Court concluded Paul E. Rhodes was not being confined in the Nebraska State Penitentiary for the purpose of serving the sentence imposed for contempt, as directed by the order issued by the Clerk of the District Court and under the apparent authority of which he had been delivered to the penitentiary (pp. 82-84, record of transcript. Printed in Appendix A hereto, infra, page 31), but that such confinement was for the purpose of holding Paul E. Rhodes in custody pending determination of the error proceedings from the conviction and sentence for contempt. The excerpts of the opinion here referred to are printed in Appendix A hereto, infra, page 27.

REASONS FOR GRANTING THIS WRIT

The writ of certiorari should be granted herein because of the apparent violations of petitioner's constitutional rights wherein the writ of habeas corpus has been unavailable to petitioner to release him from the involuntary servitude imposed upon him although he has not been convicted of a crime.

We should determine the authority of the Court to grant the Writ of Habeas Corpus, keeping in mind at all times that the purported trial on November 21, 1960, was in absence of petitioner, a trial in absentia.

I.

Where Detention Is Had under a Void Sentence in Contempt, Habeas Corpus Is the Proper Remedy.

The contention of the petitioner in this action is that under a void sentence and where confinement is had under and by virtue of said void sentence, Habeas Cor-

pus is the proper remedy and the Nebraska Supreme Court of Nebraska has so held:

In Re Havlick, 45 Neb. 747, 64 N. W. 234:

> "Where detention is had under a void sentence in contempt, habeas corpus is proper remedy."

II.

Where the Proceedings Are Wholly Void Because of Want of Jurisdiction of the Court over the Subject Matter, or Are Illegal, as Distinguishable from Being Merely Erroneous the Writ of Habeas Corpus Is the Proper Remedy.

The petitioner was not present in court at the time of the alleged trial on November 21, 1960, which goes to the jurisdiction of the court over the body of the relator. *In Re Resler*, 115 Neb. 335, 212 N. W. 765, 766:

> "It is firmly established that if a court or judge thereof renders a judgment, or who enters an order has not jurisdiction to perform the act done either because the proceedings or law under which it is taken is unconstitutional, or for any other reason the judgment is void. It may be questioned collaterally, and the defendant who is imprisoned under and by virtue of it may be discharged."

III.

Where One Is Imprisoned without Legal Authority, upon Making the Same Appear to the Judge of the District Court, It Shall Be His Duty to Forthwith Allow a Writ of Habeas Corpus.

Statute 29-2801, R. R. S. Neb. 1943, Re-issue of 1956, which reads in part as follows to-wit:

> "If any person * * *, shall be unlawfully deprived of his or her liberty and shall make application,

either by himself or by any person on his or her behalf, to any one of the judges of the District Court, * * *, and does at the same time produce to such judge a copy of the commitment or cause of detention of such person, or if the person so imprisoned or detained is imprisoned or detained without any legal authority, upon making the same appear to such judge, by oath or affirmation, it shall be his duty forthwith to allow a Writ of Habeas Corpus, which Writ shall be issued forthwith by the clerk of the district court, * * * under the seal of the court, whereof the person allowing such Writ is judge, directed to the proper officer, person or persons who detains such prisoner."

IV.

A Judgment of Imprisonment in the Penitentiary at HARD LABOR as a Sentence for Contempt of Court Is Involuntary Servitude and Is Void and Violates the Thirteenth Amendment of the Constitution of the United States of America,

U. S. Constitution, Amendment XIII:

"Neither slavery nor involuntary servitude except as punishment for a crime whereof the party shall have been duly convicted, shall exist within the United States * * *."

V.

Confinement in the Penitentiary on a Charge of Contempt of Court Is Cruel and Unusual Punishment without a Trial by Jury and Violates the Eighth Amendment to the Constitution of the United States of America.

U. S. Constitution, Amendment VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

In *Flannagan* v. *Jepson*, 177 Iowa, 393, 158 N. W. 641 and cited by the Nebraska Supreme Court as the law of the land, *Smolczyk* v. *Gaston*, 147 Neb. 681, opinion by Carter, J., who still sits on the Honorable Supreme Court of Nebraska, the Iowa Court said to-wit:

"The authorities *may be searched in vain* for any precedent, under our constitutional form of government, holding it to be in the power of a state to clothe its courts with authority to visit infamous punishment upon any person for contempt or in any proceeding whatever, other than the orderly process of trial upon indictment or information. The authority to punish for contempt is, of course, quite indispensable to orderly and efficient administration of justice; but the very fact that such authority is subject to no appeal, and its application is summary to a degree bordering on the arbitrary, makes it very essential that it shall not be enhanced to a point where our guarantees are lost sight of."

"To recapitulate: A sentence to infamous punishment in the *penitentiary at hard labor* can be lawfully imposed under our Constitution only as punishment for crime of which the accused has been duly convicted; *one is not duly convicted of crime except* in a proceeding giving opportunity for a jury trial; *a charge of contempt not being a charge of a crime triable by jury, THE COURT IS WITHOUT POWER OR AUTHORITY IN SUCH PROCEEDING* to penalize the contempt by *imposing a sentence which is constitutionally restricted to cases for conviction for crime.*" (Emphasis supplied by writer).

"Ex Parte Wilson, 114 U. S. 417, 5 Sup. Ct. 939."

"For more than a century imprisonment at hard labor—penitentiary—has been considered an infamous punishment in England and America."

and further quotes approvingly the following language of Chief Justice Shaw, *Jones* v. *Robbins*, 8 Gray (Mass.) 329:

> "A sentence to state prison for any term of time must be considered as falling within the meaning of infamous punishment. The convict is placed in a public place of punishment common to the whole state, subject to solitary imprisonment, clothed in conspicuous prison dress, subject to hard labor without pay, to hard fare, to have his hair cropped, coarse and meager food, and to severe punishment."

VI.

A Sheriff Has No Power to Execute Commitment to the Penitentiary After the Judgment on which Said Commitment Is Based Has Been Suspended by Writ of Error of Supreme Court and Judgment Has Not Been Affirmed and the Sheriff Thereafter Directed to Execute the Same.

29-2401, R. R. S. Neb. 1943, Reissue of 1956:

> "Execution of sentence; conviction of felony; delivery of prisoner to penitentiary. Every person sentenced to the penitentiary shall within thirty days, and as early as practicable after his sentence, unless the execution thereof be suspended, be conveyed to the penitentiary of this State by the sheriff of the county in which the conviction took place, and shall there be delivered to the custody of the warden of the penitentiary, together with a copy of the sentence of the court ordering such imprisonment, there to be safely kept until the term of his confinement shall have expired or he shall be pardoned. If execution of sentence be suspended and the judgment afterwards affirmed the petitioner shall be conveyed to the penitentiary within thirty days after the court shall direct the sentence to be executed."

In *State ex rel Hunter*, 135 Neb. 136, 280 N. W. 886:

> "An error proceeding or criminal case does not suspend the sentence within the legal meaning of that term, but does stay the execution of sentence."

The sheriff had no authority to deliver petitioner to the Warden of the State Penitentiary, Maurice Sigler, as shown by the Receipt on page 82 of the Transcript (page 33, Appendix A).

VII.

That Execution of a Sentence to the Penitentiary After the Issuance of Writ of Error by the Supreme Court and Suspension of Said Sentence Is a Denial of Due Process of Law and Violates the Fourteenth Amendment of the Constitution of the United States of America and the Equal Protection of the Law Provisions of the Constitution.

U. S. Constitution, XIV Amendment:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

The Supreme Court of Nebraska in its opinion herein makes the following statement, to-wit:

> "We think it clear from the 21st of November, 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of this court." (page 27, Appendix A).

This language is in error and ignores the Fourth Amendment to the Constitution of the United States which reads as follows:

> "The right of people to be secure in their person, houses, papers, and effects, against unreasonable search and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

This amendment is applicable to the States by virtue of the Fourteenth Amendment of the Federal Constitution.

The United States Supreme Court affirms this doctrine in *Monroe* v. *Pape*, 81 S. Ct. 473, with the following language:

> "Fourth Amendment's guarantee against unreasonable search and seizures is applicable to the states by reason of due process of law clause of the fourteenth Amendment. U.S.C.A., *Constitutional Amendments, 4, 14.*"

The Court further held in *Monroe v. Pape*, supra:

> "Congress has power to enforce Fourteenth Amendment against those who carry badge of authority of a state and representation in some capacity, whether they act in accordance with their constitutional authority or misuse it."

A state court that does not have jurisdiction over the body in a proceeding in rem, such as contempt, does not have jurisdiction where the defendant is not present in Court at trial time, has no jurisdiction to impose sentence and enforce same in any manner and the sheriff would have no authority without a warrant to deprive the relator of his liberty, and to execute said sentence.

There is nothing in the record anywhere to support the following purported statement of fact in the opinion of the Nebraska Supreme Court:

> "He is not being held as one serving the sentence imposed in that action." (page 27 in Appendix A)

This has never been the contention of the respondent. The respondent has proceeded to enforce said sentence to the letter, has placed the petitioner on the records of the Nebraska State Penitentiary, as Convict Number 21675, has so entered him on the F.B.I. files in Washington, D. C., has placed petitioner in a public place of punishment common to the whole state, subjected him to solitary imprisonment, clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, cropped petitioner's hair, furnished petitioner coarse and meager food, imposed severe punishment on petitioner, confined petitioner in the penitentiary hole (dungeon), credited the petitioner with diminution of sentence for good behavior as provided by 29-2632, R. R. S. Neb. 1943, furnished petitioner the date of July 5, 1961, when the lawful requirements of the sentence would have been completed, and, at no time has pretended to hold petitioner for the sheriff of Morrill County, Nebraska, under Section 29-1001, R. R. S. Neb. 1943. Respondent had informed petitioner that he would be discharged as having completed the terms of the sentence on July 5, 1961, and, respondent has pursuant to 29-2627, R. R. S. Neb. 1943, as amended, tailor made a suit in preparation for said release as a convict.

VIII.

The Courts Do Not Have Authority to Suspend the Writ of Habeas Corpus.

Article I, Section 9 of the Constitution of the United States:

> "Habeas Corpus. The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it, and then only in such manner as shall be prescribed by law."

The District Court of Morrill County, Nebraska, at no time ordered the rearrest or the taking into custody of the petitioner herein contrary to the discharge in habeas corpus entered by the county court of Morrill County, Nebraska, on September 2, 1960 (pp. 13-16 in Transcript) and at no time authorized or ordered any officer to deprive petitioner of his liberty and all was done without any order of court authorizing the same and in defiance of the Suspension granted by the Supreme Court entered December 23, 1960.

Nowhere does the record disclose that, pursuant to the suspension of the contempt sentence, bond was ever set by the District Court of Morrill County, Nebraska.

I suggest to the Court that the United States of America is "a government of laws and not men" but when the writ of habeas corpus is suspended contrary to Article I, Section 9 of the United States Constitution, making it impossible to be released from *involuntary servitude* imposed contrary to the Thirteenth Amendment to the Constitution of the United States, the foregoing fundamental legal principle would seem to be scrapped.

The Supreme Court of Nebraska has erroneously failed to give application to the above principles and has erroneously failed to consider the Constitutional rights of petitioner under the Constitution of the United States as above set forth and not in accord with applicable decisions of this Court, particularly the case of *Monroe v. Pape*, 81 S. Ct. 473 (1961), holding that arrest without a warrant is a violation of the Federal Civil Rights Act and that the Fourth Amendment of the U. S. Constitution guarantees are applicable to states by reasons of the Due Process of Law Clause of the Fourteenth Amendment of the U. S. Constitution.

Petitioner heretofore submitted a *Certificate of Justice of State Court that Constitutional Question Was Considered* to the Honorable Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska (infra, Appendix A, pages 34-35) together with a Certificate of Justice of State Court of Finality of Judgment (infra, Appendix A, page 36) but such certificates were returned to petitioner, unexecuted, by the Clerk of the Supreme Court of Nebraska (infra, Appendix A, page 37).

CONCLUSION

For the foregoing facts and reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL E. RHODES, Pro Se,
Convict No. 22107,
Nebraska State Penitentiary,
Lincoln, Nebraska.

APPENDIX A

Opinion from The Nebraska Supreme Court. Rhodes v. Sigler. 172 Neb. 439.

PAUL E. RHODES, APPELLANT, v. MAURICE SIGLER, APPELLEE

— N. W. 2d —

Filed June 23, 1961. No. 35029

APPEAL from the district court for Lancaster County: PAUL W. WHITE, JUDGE. *Affirmed.*

Paul E. Rhodes, W. H. Kirwin, and *Clayton H. Schrout,* for appellant.

Clarence A. H. Meyer, Attorney General, and *Cecil S. Brubaker,* for appellee.

Heard before SIMMONS, C. J., CARTER, MESSMORE, YEAGER, SPENCER, BOSLAUGH, and BROWER, JJ.

SIMMONS, C. J.

This is a habeas corpus action. Relator is being held in custody at the penitentiary. The respondent is the warden of the penitentiary. The trial court denied release from custody of the relator. He appeals. We affirm the judgment of the trial court.

The relator is a defendant in a felony case pending in the district court for Morrill County. Following a series of actions and conduct in the courts of and for Morrill County, the district court there found relator guilty of contempt of the court and sentenced him to confinement in the Nebraska State Penitentiary for a period of 9 months at hard labor, Sundays and holidays excepted, and to pay a fine of $2,500 and costs.

Relator then filed a petition in error and a transcript of the proceedings in this court. In that case on motion of the relator we suspended the execution of the judgment and directed the district court for Morrill County to admit the relator to bail. This order was issued December 23, 1960.

In the meantime on November 25, 1960, the clerk of the district court for Morrill County had issued an order to the sheriff of Morrill County to execute the sentence and order of the court. On January 23, 1961, the sheriff delivered the relator to the penitentiary where he is now held.

Relator here argues that he was tried for contempt in his absence and that no order was issued for the arrest of the relator by the trial court. He contends that the order of commitment was unauthorized and that he is being held under a sentence of the trial court which has been suspended by this court.

The district court for Lancaster County issued an order to show cause. Hearing was had on the question of whether a writ should be issued. The issuance of the writ was denied. This is an appeal from that denial.

Relator apparently has elected not to ask to be admitted to bail. His petition in error here presented questions which arose prior to his delivery to the penitentiary.

The jurisdiction of the cause is in this court in the error proceedings from Morrill County. The trial court properly refused to issue a writ under the rules stated in McFarland v. State, *ante* p. 251, — N. W. 2d —: It is the general rule that a court is without jurisdiction where it attempts by habeas corpus to interfere with

the exercise by another court of jurisdiction theretofore acquired, whether such jurisdiction is acquired in another habeas corpus proceeding or on appeal, or otherwise, unless the prior jurisdiction has been terminated. A writ of habeas corpus can be granted only by a court having jurisdiction, and the exercise of power to grant the writ cannot be used to unsettle valid legal proceedings, or to interfere with the exercise of jurisdiction of other courts.

We need not determine here whether the issuance of the order of commitment on November 25, 1960, was regular or irregular. As to that the rule is: If the proceedings subsequent to conviction are erroneous, such errors can be reviewed and corrected by proceedings in error in the regular course of the law, but not by the writ of habeas corpus. In re Application of Cole, 103 Neb. 802, 174 N. W. 509.

We think it clear that from the 21st of November 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of the court. Our order suspending the sentence did not suspend liability to that custody save and until the relator was admitted to bail. Relator is now being held in custody pending the determination of error proceedings from Morrill County. He is not being held as one serving the sentence imposed in that action.

It appears from this showing that the sheriff had full authority under the provisions of section 29-1001, R. R. S. 1943, to hold relator in a "secure and convenient place of confinement." If there is error in the determination it is a matter to be corrected in an error proceeding and not in habeas corpus. It has long been the

rule that: The writ of habeas corpus is not a writ for the correction of errors, and will not be allowed to be used for that purpose. In re Application of Cole, *supra*.

The judgment of the district court for Lancaster County is affirmed.

AFFIRMED.

Excerpts from Rhodes v. Sigler, 172 Neb. 439.

Nebr. Vol. 172, p. 440; Rhodes v. Sigler:

"The relator is a defendant in a felony case pending in the district court for Morrill County. Following a series of actions and conduct in the courts of and for Morrill County, the district court there found relator guilty of contempt of court and sentenced him to the Nebraska State Penitentiary for a period of 9 months at hard labor, Sundays and holidays excepted, and to pay a fine of $2,500.00 and costs.

"Relator then file a petition in error and a transcript of the proceedings in this court. In that case on motion of the relator we suspended the execution of the judgment and directed the district court for Morrill County to admit the relator to bail. This order was issued December 23, 1960.

In the meantime on November 25, 1960, the clerk of the district court for Morrill County had issued an order to the sheriff of Morrill County to execute the sentence and order of the court. On January 23, 1961, the sheriff delivered the relator to the penitentiary where he is now held."

"We think it clear that from the 21st of November, 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of the court. Our order suspending the sentence did not suspend liability to that custody save and until the relator was admitted to bail. Relator is now being held in custody pending the determination of error proceedings from Morrill County. He is not being held as one serving the sentence imposed in that action."

Questions in Appellant's Brief to the Supreme Court of Nebraska.

The question involved in this action is whether after a trial in absence of defendant in a contempt proceeding and no order issued for the arrest of defendant, he not being in custody and not within the jurisdiction of the court; the court enters an order finding defendant guilty in his absence and sentences him to the penitentiary at hard labor for contempt of court, and the court does not order him into custody, is the Clerk of the Court authorized to issue a commitment to penitentiary without order of court therefore, and the Supreme Court thereafter suspends the execution of said sentence, and thereafter without a warrant or order of court the defendant is taken into custody by force, and thereof the commitment is executed by the sheriff and Warden of the penitentiary without any order for execution of the sentence, is the defendant as relator in a District Court Habeas Corpus proceeding entitled to a Writ of Habeas Corpus and discharge from custody? (See page 48 for additional Questions Involved.)

ADDITIONAL QUESTIONS INVOLVED

2. That a trial in absentia, in absence of defendant, is a nullity, absolutely void, and relator imprisoned thereunder is entitled to discharge upon habeas corpus.

3. There is no power or authority to arrest on a commitment; it is not a warrant for purposes of arrest.

4. After suspension of sentence by Supreme Court on error proceedings the sheriff has no authority to execute a commitment issued prior to said suspension

without further order of the court directing its execution.

5. Where sentence is executed after suspension by the Supreme Court and confinement had in the penitentiary contrary to the suspension habeas corpus is the proper remedy for discharge and release.

6. A sentence for contempt of court at hard labor in the penitentiary is absolutely void in Nebraska and a violation of Article I, Sec. 2 of Nebraska Constitution and thirteenth amendment to Constitution of United States and due process of law clause of both said Constitutions and defendant imprisoned thereunder at hard labor is entitled to writ of habeas corpus and discharge thereunder.

7. That the clerk of the court is not authorized to issue writ of commitment to penitentiary where defendant is not in custody and there is no order of court directing that he be taken into custody.

8. Where detention is had under a void sentence habeas corpus is proper remedy.

9. Where imprisonment is being suffered under judgment for contempt is habeas corpus the proper proceeding for inquiry into the question of jurisdiction?

10. Where proceedings are wholly void for want of jurisdiction over the subject matter or wholly illegal is habeas corpus proceedings the proper procedure for release from said unlawful imprisonment and involuntary servitude?

11. Does the court in a prosecution for criminal contempt have jurisdiction to try defendant in his absence, make a finding of guilty and pass sentence?

12. Do the rules which govern criminal prosecutions apply to prosecutions for criminal contempt?

13. The court has no jurisdiction to sentence to the penitentiary at hard labor in Nebraska for contempt of court, no trial by jury being allowed in contempt proceedings.

14. That the court has no jurisdiction of the subject matter in a contempt proceeding at time of trial when alleged defendant is not in court.

15. That where defendant is imprisoned on an executed sentence of involuntary servitude contrary to Article I, Section 2 of Nebraska Constitution and thirteenth amendment to Constitution of United States of America habeas corpus is the proper remedy for release from said unlawful imprisonment, and when he has been denied due process of law.

16. That the court is without jurisdiction to order confinement in the penitentiary in Nebraska for contempt of court for reason pursuant to Article I, Section 11 of Nebraska Constitution and the Constitution of United States of America, sixth amendment, no imprisonment may be made to penitentiary without trial by jury; trial by jury is not allowed in criminal contempt proceedings in Nebraska and that therefore any confinement in the penitentiary for contempt of court is a denial of due process of law pursuant to Article I, Section 3, Nebraska Constitution and fourteenth amendment to Constitution of United States of America.

Commitment, Sheriff's Return and Warden's Receipt.

STATE OF NEBRASKA,)
) ss.
MORRILL COUNTY)

The State of Nebraska, Morrill County.

To the Sheriff of said County:

WHEREAS: At a regular term of the District Court for said county, which term was begun and held at the Court House, in Bridgeport, in said county, on the 18th day of April 1960; Present, the Hon. R. M. Van Steenberg one of the judges of said court;

AND, WHEREAS, Clarence S. Beck, Attorney General for the State of Nebraska, on the 29th day of July 1960, came into Court, and presented a certain information in due form of law, against Paul E. Rhodes for Contempt of Court which information was by order of the Court filed and the cause docketed; and afterwards on the 6th & 7th days of September and the 21st day of November, 1960, further proceedings were had upon said information, to wit:

ON TRIAL TO THE COURT the said Paul E. Rhodes was put upon his trial, and the said Court entered a Judgment of "Guilty of Contempt as charged".

AND, WHEREAS. On the 21st day of November 1960, the said Paul E. Rhodes was then by the said judge sentenced, in these words: "IT IS THEREFORE ORDERED AND ADJUDGED that the defendant, Paul E. Rhodes, is guilty of contempt of court as charged and is hereby sentenced to confinement in the Nebraska State Penitentiary at Lincoln, Nebraska, for a period of

nine (9) months at hard labor, Sundays and holidays excepted, and to pay a fine in the amount of two thousand five hundred dollars ($2,500.00) and the costs of this proceeding.".

You are therefore commanded to proceed to execute the said sentence and order of the Court.

WITNESS, my hand and seal of said Court, at Bridgeport, Nebraska, this 25th day of November, 1960.

(SEAL) (Signed) Virginia A. Schuetz
Clerk District Court.

COMMITMENT

DISTRICT COURT

County, Neb.

THE STATE OF NEBRASKA,

vs.

FILED January 24, 1961

(Signed) Virginia A. Schuetz

Clerk District Court

State of Nebraska)
) ss.
County of Morrill)

Received this Commitment on the 25th day of November, 1960 and as commanded by this commitment I on the 23rd day of January, 1961 delivered the within named Paul E. Rhodes to the Nebraska Penitentiary at Lincoln, Nebraska.

Dated this 24th day of January, 1961.

(Signed) Norval E. Houston, Sheriff

Mileage	820	$ 66.60
Meals & Room		16.80
Filed for with County		$ 83.40

NEBRASKA STATE PENITENTIARY

Lincoln, Nebraska, Jan. 23, 1961

To the Clerk of Court:

This Doth Certify, That Norval E. Houston, Sheriff of Morrill County, Nebraska, did, on the day of the date hereof, deliver to the Nebraska State Penitentiary, at Lincoln, Nebraska, the body of Paul E. Rhodes who was tried, convicted, and sentenced at the April Term, 1960, of the District Court of said County, held at Bridgeport, Nebraska, April 18, 1960.

(Signed) Maurice H. Sigler
Warden of Penitentiary

Appendix

Certificate of Justice that Constitutional Question Was Involved (unexecuted).

SUPREME COURT OF THE UNITED STATES
from SUPREME COURT OF NEBRASKA

PAUL E. RHODES, Petitioner

vs.

MAURICE SIGLER, Respondent

CERTIFICATE OF JUSTICE OF STATE COURT THAT CONSTITUTIONAL QUESTION WAS CONSIDERED

I, Robert G. Simmons, Chief Justice of the Supreme Court of Nebraska, hereby certify:

That in the above entitled cause the questions whether the Writ of Habeas Corpus is suspended in Nebraska as against a District Court contempt of court proceeding wherein the defendant in said Contempt proceeding is tried without a jury, and Sentenced to Imprisonment in the Nebraska State Penitentiary for nine (9) months at HARD LABOR, and said trial was conducted, in the absence of the defendant and his attorneys, and said judgment was entered without a trial by jury in the absence of the defendant, sentence to imprisonment in the State Penitentiary at Hard Labor and fine of $2,500.00 and costs for the offense of contempt of court, to sentence to hard labor for the offense of contempt of court, to refuse to recognize a Writ of Habeas Corpus previously granted and unappealed from and a final judgment, to arrest without a warrant and commit to the penitentiary to serve said sentence at hard labor as a convict, after said sentence had been suspended by the Supreme Court of the State of Nebraska

in an Error proceeding, and had not been remanded to the District Court with directions to execute said sentence, is repugnant to the provisions of United States Constitution Article I, Section 9 and IV, V VI, VIII, XIII, XIV Section 1, Amendments to the Constitution of the United States, Article I, Section 9 providing "* * * The privilege of the Writ of Habeas Corpus shall not be Suspended * * *"; and Amendments IV "The right of the people to be secure in their persons * * * against unreasonable search and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing * * * the persons or things to be seized"; and Amendment VI "In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * * to be confronted with the witnesses against him * * *"; and Amendment VIII "Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted"; Amendment XIII "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction"; and Amendment XIV "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws," was considered and passed upon by this court.

Dated October , 1961.

Chief Justice of Nebraska Supreme Court

Attest:

Clerk of Nebraska Supreme Court

Certificate of Justice of State Court of Finality of Judgment (unexecuted).

SUPREME COURT OF THE UNITED STATES
FROM SUPREME COURT OF NEBRASKA

PAUL E. RHODES, Petitioner

vs.

MAURICE SIGLER, Respondent

CERTIFICATE OF JUSTICE OF STATE COURT
FINALITY OF JUDGMENT

I, Robert G. Simmons, presiding Chief Justice of the Supreme Court of Nebraska, hereby certify:

That the Supreme Court of Nebraska is the highest court of this state in which a decision in the above entitled suit could be had, The Supreme Court of the State of Nebraska having denied a rehearing therein, and that upon affirmance by said Supreme Court of Nebraska, the judgment in said cause became final on the same day after the same was pronounced leaving Nothing to be done by the Court below, but to Execute the judgment already rendered, which disposes of all the elements of controversy, and that the rehearing therein was denied on Friday, October 13, 1961, A.D.

Dated this day of October, 1961.

Chief Justice of Supreme Court of Nebraska

Attest:

Clerk of Supreme Court of Nebraska

Letter from Clerk of Nebraska Supreme Court

STATE OF NEBRASKA
SUPREME COURT

November 28, 1961

Paul E. Rhodes,
Box 47,
Howe, Nebraska.

In re Rhodes v. Sigler, No. 35029.

Dear Sir:

Inclosed herewith is your transcript on certiorari to the Supreme Court of the United States in the above case, together with statement for the cost thereof.

Section 29 - 2824 does not provide that there shall be no costs in habeas corpus action, but only that a Clerk may not demand his fees in advance. I believe that in any case this does not apply in your case because it relates only to a habeas corpus action where a person is seeking discharge from custody "in any criminal case."

I do not find anything in the Rules of the Supreme Court of the United States either requiring or authorizing certificates from the Chief Justice such as you tendered to me when you were last in the office and for this reason I am returning them herewith, unsigned.

Yours truly,

(Signed) George H. Turner
Clerk.

Inc.
GHT-G.

Rehearing Denied.

And afterwards, to-wit, on the 13th day of October, 1961, there was rendered by said Supreme Court of Nebraska, and entered of record upon Journal RRR thereof, at page 249, a certain ORDER, in the words and figures following, to wit:

Oct. 13.

Paul E. Rhodes, Appellant.

v.

Maurice Sigler, Appellee.

Appeal from the District Court of
Lancaster County. No. 35029.

This cause coming on to be heard upon motion of appellant for a rehearing herein, was argued by counsel and submitted to the court; upon due consideration whereof, the court finds no probable error in the judgment of this court heretofore entered herein. It is, therefore, considered, ordered and adjudged that said motion for rehearing be, and hereby is, overruled and a rehearing herein is denied.

Robert G. Simmons
Chief Justice.